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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DOMINGO CASTILLO MARCELINO, et
al.,

Plaintiffs,

New York, N.Y.

v.

16 Civ. 6287(KPF)

374 FOOD INC., et al.,

Defendants.

-----x

May 1, 2018

3:28 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

MICHAEL FAILLACE & ASSOCIATES, P.C.

Attorneys for Plaintiffs

BY: SHAWN RAYMOND CLARK

COLIN JAMES MULHOLLAND

LEHMAN LG LLC

Attorneys for Defendants

BY: BRIAN EARL LEHMAN

JULIE ROSENBLUM SOLARZ

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1 THE CLERK: In the matter of Marcelino versus 374
2 Food. Counsel, please identify yourselves for the record.

3 MR. CLARK: Shawn Clark, of Michael Faillace &
4 Associates, for plaintiff. Good afternoon, your Honor.

5 THE COURT: Sir, good afternoon.

6 MR. MULHOLLAND: Colin Mulholland, with Michael
7 Faillace & Associates. Good afternoon.

8 THE COURT: Good afternoon as well. Thank you.

9 MR. LEHMAN: Brian Lehman of Lehman LG LLC.

10 THE COURT: Yes. Thank you.

11 MS. SOLARZ: Julie Solarz, Lehman Law Group, for 374
12 Food Inc., et al.

13 THE COURT: Thank you so much. OK.

14 Mr. Clark, should I be directing questions to you or
15 to Mr. Mulholland?

16 MR. CLARK: I can principally answer your questions,
17 your Honor, but Mr. Mulholland may have additional information.

18 THE COURT: That is fine. Sir, there seem to be two
19 issues raised in Mr. Lehman's correspondence with me, and one
20 is the issue of disqualification and the other is the issue of
21 the need, or not, for an evidentiary record. I do understand
22 that you disagree on both parts, but I just want to explore the
23 issues with you a little bit. And, look, I also understand,
24 just by way of background, you will either agree or disagree
25 with my decision but it is a decision I am not moving from.

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1 Given the findings I have made, the question is what do we do
2 now.

3 So, Mr. Clark, what is your view with respect to the
4 issue of disqualification, unless you are just going to rely on
5 your papers?

6 MR. CLARK: Your Honor, we oppose. We believe that
7 any potential sanctions are speculative, especially in light of
8 the submission yesterday, which pointed out that defense
9 counsel believes that on the record as it stands there is
10 insufficient evidence for a sanctions finding against counsel.
11 Given that disqualification is itself based on the idea that
12 there could potentially at some point be a --

13 THE COURT: I will ask you just to slow down, please.
14 Thank you so much.

15 MR. CLARK: I apologize, your Honor.

16 THE COURT: No problem, sir.

17 MR. CLARK: Given that the disqualification motion is
18 itself based on the idea that I believe essentially that any
19 sanction against -- any sanctions motion which affects both the
20 client and counsel could potentially create a conflict, I
21 believe that the concession that the record as it stands does
22 not support sanctions really eliminates the underlying basis,
23 such as it is, for a disqualification motion.

24 In addition --

25 THE COURT: Yes, sir.

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1 MR. CLARK: In addition, the plaintiff in this case
2 has been advised of your Honor's opinion and any potential
3 consequences of that opinion, and he still wishes to continue
4 with us as counsel of record. Given that, and the case law
5 concerning disqualification in the Second Circuit, we believe
6 disqualification isn't appropriate, and at the very least it is
7 an issue that should be briefed given the considerable legal
8 issues underlying the case.

9 THE COURT: OK. Let me just probe that with you a
10 little bit, sir.

11 The way I see my finding, I made a finding that
12 Mr. Castillo Marcelino perjured himself, and to my mind he
13 either did it on his own or he did it with your -- I hate to
14 think with your knowledge or with your instigation, and I am
15 worried about figuring out what happened. You'll excuse me for
16 using the criminal analogue, but in a criminal case sometimes
17 when there is a question about disqualification, there is a
18 hearing where a second attorney is appointed in order to
19 explore conflict issues with the client. This is -- we just
20 call it a Curcio hearing. And I'm just wondering if I were
21 able to obtain through the *pro se* office, because it's my
22 expectation that Mr. Castillo Marcelino is without funds at
23 this time to hire another attorney, if I were able to secure
24 someone to speak with him and just sort of give him a second
25 opinion, would there be anything objectionable to that, sir?

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1 MR. CLARK: I believe so, your Honor, given that he
2 did choose us as his counsel of record. Disqualification is a
3 severe sanction --

4 THE COURT: Sir, I want to be clear on what I'm
5 saying. I'm not saying to disqualify you. I'm saying to make
6 sure that he just has a second opinion on the various issues
7 raised by the disqualification motion.

8 MR. CLARK: Your Honor, if I would be able to return
9 to you with an answer on that? My feeling -- my instinct is
10 that given the speculative nature of the sanctions at this
11 time, I don't think that there is anything really close at this
12 time concerning potential sanctions which I think is concrete
13 enough to create even a potential conflict.

14 THE COURT: OK.

15 MR. CLARK: Now, certainly if -- which moves me to my
16 second point, that I do think that there needs to be briefing
17 by Mr. Lehman concerning the questions asked by your Honor
18 before we can meaningfully proceed.

19 THE COURT: Just him? I presume you as well?

20 MR. CLARK: Oh, yes, of course, in response to his
21 briefing.

22 Part of the issue is is that insofar as was raised by
23 defendants' letter in the case --

24 THE COURT: Which? The disqualification letter, sir,
25 or the evidentiary letter?

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MR. CLARK: The evidentiary letter.

THE COURT: Yesterday's letter.

MR. CLARK: It is relatively unclear what, you know, the nature of the sanctions the defendants wish to explore are. Certainly he has I think correctly noted that he cannot seek Rule 11 sanctions at this time. They would need to be sua sponte sanctions. He also explored that he doesn't believe that unless Second Circuit law changes and/or additional evidence arises, that he can actually seek sanctions under the other section -- another statutory provision.

Now, and the additional issue in the case --

THE COURT: Yes, sir.

MR. CLARK: -- as I understand it --

THE COURT: -- yes, sir.

MR. CLARK: Is in addition to the fact that it's still unclear to me precisely the contours of the potential sanctions that defendants are seeking, there is case law, to our understanding, which I think your Honor should potentially review concerning your finding of this client engaging in perjury. The case in particular that we found is a case called Penthouse International, Limited v. Dominion Federal Savings and Loan Association, 855 F.2d 963. And in that particular case it had, I think, very similar facts to this one, where a district judge made a finding of perjury after reviewing all of the evidence. And the Second Circuit's reaction to this was --

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1 and if I may quote it?

2 THE COURT: You may.

3 MR. CLARK: "with regard to the perjury finding, we
4 are somewhat surprised by its presence in the Court's decision.
5 If the Court viewed Gorlich's testimony as incredible, that is
6 its prerogative as the trier of fact in a nonjury case. But
7 unless perjury is at issue in a case, such a finding is not
8 necessary once the trier of fact finds the witness' testimony
9 incredible. The perjury finding here, however, was not only
10 unnecessary but also was erroneous since it was not based on
11 clear and convincing proof."

12 Now, I think that raises two issues which I think that
13 the Court should address in one way or another.

14 THE COURT: Mm-hmm.

15 MR. CLARK: First is the issue of whether the Court
16 could appropriately move on to this question, given it wasn't a
17 necessary element of any claim. And then the second question
18 is whether or not the Court identified and employed the clear
19 and convincing evidence standard for --

20 THE COURT: I cited Dunnigan in my decision so I did
21 note the standard.

22 Your first argument is a stronger one, which is that
23 perhaps what I should have done is simply disregard his
24 testimony or credit it as far as I do and leave it at that,
25 without worrying about sanctions. But in terms of not using

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1 the right standard, oh, no, I knew -- I knew -- the standard
2 that I was using.

3 MR. CLARK: In which case I do think that there is an
4 additional issue that we would at least like to brief the
5 Court --

6 THE COURT: Of course.

7 MR. CLARK: -- concerning that, which I don't believe
8 we had the opportunity to as of yet.

9 THE COURT: OK.

10 MR. CLARK: And because of that, in combination with
11 the --

12 THE COURT: Might I know what that other issue is,
13 sir, please?

14 MR. CLARK: Excuse me?

15 THE COURT: Might I know what your other issue is?

16 MR. CLARK: The issue beyond --

17 THE COURT: Yes.

18 MR. CLARK: In terms of the disqualification issue,
19 that I believe any potential sanctions are merely potential at
20 this time.

21 THE COURT: OK. I might have misunderstood the very
22 last thing that you were saying and that's because I
23 interrupted you. It is my recollection, from writing the
24 opinion, that I did include Dunnigan -- the cite to Dunnigan,
25 which is the criminal case, and I do believe I was using clear

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1 and convincing. I thought I heard you say that that raises
2 another issue. Are you saying with respect to the
3 disqualification motion or something else, sir?

4 MR. CLARK: It raises the issue that -- and certainly
5 I think that this comes up in the context of whether or not
6 sanctions are appropriate as to the plaintiff --

7 THE COURT: Yes.

8 MR. CLARK: -- particularly, that whether or not there
9 was sufficient evidence to meet that standard based on the
10 facts of the case. Certainly given, you know, your Honor's
11 opinion and your statement now that you did recognize that as
12 the standard, we certainly will understand and respect that.
13 At the same time, I don't believe that there is any post-trial
14 briefing concerning this issue, and we do think it is germane
15 to the question of whether or not sanctions are appropriate
16 against the plaintiff and, accordingly, would be something that
17 we would address.

18 THE COURT: So there are two issues. The first is
19 disqualification, which we have been talking about, and that
20 sort of dovetails into the second, which is the need for an
21 evidentiary hearing.

22 Is it your position, sir, that -- I mean, would you
23 agree with me, and with Mr. Lehman, that right now Mr. Lehman
24 is operating a little bit in the dark because he is not
25 privy -- and I'm not saying he ever will be privy -- to the

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1 communications that you had with your client preliminary to
2 taking the lawsuit and proceeding to trial?

3 MR. CLARK: Well, certainly I think that we're in the
4 dark, too, to the extent that it's not clear what the theory or
5 nature of the alleged sanctions are. Without some briefing by
6 him clarifying at least the nature of the sanctions --

7 THE COURT: OK.

8 MR. CLARK: -- I don't know how we can reasonably
9 respond or how a hearing is going to effectively address the
10 issues before the Court.

11 THE COURT: All right. I think you and I are talking
12 past each other. Let me say that again.

13 Your point to me is that you're operating with a
14 deficiency of -- without knowledge of the precise legal issues
15 that are being raised by Mr. Lehman but actually that came
16 initially from me. And what I'm trying to figure out is having
17 found that there was such severe perjury at this trial, what am
18 I to do? You may say to me, based on the Penthouse
19 International decision that you just quoted from, that I am
20 limited, I am limited to a finding against him. This is the
21 lies were to me in my capacity as trier of fact and not as
22 judge and I can discredit them, but I can't say that they
23 amount to something warranting additional sanctions. That's
24 what I understood you to be saying with that citation; yes,
25 sir?

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MR. CLARK: That is a potential argument, your Honor.

THE COURT: That is a potential argument. And so to say you don't know what sanctions Mr. Lehman is seeking is understandable, but I guess that's also what I'm trying to figure out. I'm trying to figure out the rights that I have. It does appear that I have Rule 11 rights. I always have, to a degree, my inherent powers. There is -- is it 1297 or 1927? I always get them confused.

MR. CLARK: Yes, 1927.

THE COURT: 1927, that's specific to the attorneys, correct?

MR. CLARK: Mm-hmm.

THE COURT: And so from my perspective, whatever I have in play is in play. I believe what Mr. Lehman was saying -- and eventually I will let him speak -- is that in addition to whatever he would want to tell me about how this affected the defendants, one of the specific things he wants to tell me is that the lies told by Mr. Castillo Marcelino regarding Tiran Tsadok were particularly deleterious because he had never met him, he had to come up from Florida for this, there was no reason for him to identify him falsely as the individual with whom he had regular communications at Tribeca Vehicles. So that's what I was understanding.

So I hear your -- your point, sir, is you need to know what the playing field is before you can respond to some of the

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1 questions. I'm just not sure that is the case. I'm trying to
2 understand -- from my perspective, all sanction avenues are
3 open until you tell me they are closed.

4 Is what you're saying, sir, is that it would be your
5 preference to first decide on a set of sanctions and then
6 decide what evidentiary information would be appropriate for me
7 to decide that issue? Because right now are we in agreement,
8 sir -- well, I'll ask Mr. Lehman. Rule 11 doesn't seem to be
9 in play, correct?

10 MR. CLARK: I would agree that Rule 11 doesn't seem to
11 be in play.

12 THE COURT: Mr. Lehman, do you think it is?

13 MR. LEHMAN: It is in play for you, your Honor.

14 THE COURT: I still have it, OK. Fair enough.

15 MR. LEHMAN: Just to clarify, do you mean in play for
16 the plaintiff's counsel or for the plaintiff?

17 THE COURT: As to both.

18 MR. LEHMAN: So certainly for plaintiff's counsel and
19 for that one narrow provision of Rule 11, if the plaintiff
20 caused the violation by the plaintiff's counsel, then he can be
21 sanctioned.

22 THE COURT: OK.

23 MR. LEHMAN: Generally Rule 11 only speaks to
24 attorneys, but if I advocate evidence and give it to my
25 attorney and he gives it to the court, the court doesn't

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1 sanction the plaintiff's counsel, they sanction plaintiff.

2 THE COURT: Understood. OK.

3 So, Mr. Clark, it seems like from Mr. Lehman's
4 perspective all avenues are open.

5 MR. CLARK: Well --

6 THE COURT: Would you like first to respond to more
7 robust briefing on sanctions and then on the hearing, or not,
8 that is necessary?

9 MR. CLARK: Really --

10 THE COURT: Mr. Mulholland. Yes.

11 MR. MULHOLLAND: I think the main concern the
12 plaintiff has right now is that there has been an order by the
13 Court and there has been two submissions by Mr. Lehman.

14 THE COURT: Yes.

15 MR. MULHOLLAND: The plaintiff would like an
16 opportunity to brief and respond to all of those allegations in
17 writing, complete with case law, prior to any decision being
18 made on either the disqualification or the evidentiary hearing.

19 THE COURT: Well, then to my earlier question, are you
20 asking that I accept Mr. Lehman's invitation that this be a
21 letter in furtherance -- a premotion letter and that there be a
22 more detailed motion from him regarding sanctions and/or the
23 need for an evidentiary hearing, to which you may respond with
24 more detail and more case law?

25 MR. CLARK: If my understanding is that if this is

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1 interpreted as a premotion letter and this is simply added to
2 the other arguments already expected by your Honor in
3 defendants' briefing, I would agree with that. I think that
4 you can deal more fully with the issue after it is briefed in
5 tandem with the other issues.

6 THE COURT: One moment.

7 Off the record.

8 (Pause)

9 THE COURT: All right. Thank you.

10 Counsel, my point is this. It is not often -- indeed,
11 it's hardly ever that I make the findings that I make in the
12 opinion that I made. I don't go inviting sanctions
13 applications. This is very serious to me. I want everyone's
14 best ideas as to what I can do and what I should do.

15 So, from your perspective, sir, how can I get the very
16 best information about what I can and what I should do?

17 MR. CLARK: I do believe that briefing is appropriate.

18 THE COURT: OK.

19 MR. CLARK: And then based on that briefing, which can
20 include more clear articulation of the need, or lack thereof,
21 of a hearing, and then based on that written briefing determine
22 whether a hearing is necessary.

23 THE COURT: Simultaneous or responsive?

24 MR. CLARK: I would say responsive with really the
25 same framework that your Honor crafted in the opinion. I'm

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1 certainly happy to give defense counsel an extension of time,
2 as he requested in his letter. And as long as I think that we
3 get like 30 days to respond from the date of defense counsel's
4 submission, I think we would be open to that.

5 THE COURT: OK. Mr. Lehman, let me please hear from
6 you, sir. Thank you for your patience.

7 MR. LEHMAN: With regard to the plaintiff, it is not
8 speculative that he will be sanctioned of some sort.

9 THE COURT: It is my expectation but we'll see. They
10 may persuade me through this Penthouse case --

11 MR. LEHMAN: Right.

12 THE COURT: -- that I am limited or I should limit
13 myself simply to not accepting his testimony. I'm not -- we'll
14 see.

15 MR. LEHMAN: So if one were to assume for the sake of
16 argument that that's going to happen, or it has some percentage
17 chance, then the only question after that is how much. One
18 dollar? A thousand? 10,000? 50,000. It could get high.
19 There is some case law out there that has people compensate the
20 court for its time, and given the average district court is
21 about like 1.1 million a year for the security in the building,
22 the numbers I've seen are somewhere between 300 and a thousand
23 dollars an hour. So multiplied by the hours, it could get
24 significant for the plaintiff.

25 That part is not speculative. Regarding the briefing

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1 on plaintiff's counsel, I don't know that I can give briefing
2 for what I think should happen.

3 THE COURT: I'll ask the question differently.

4 MR. LEHMAN: Sure.

5 THE COURT: To the extent I construe your
6 submissions -- which really did provoke some thought, so I do
7 thank you for them -- as premotion submissions, do you have
8 more to give me? If the answer is no, if the answer is this is
9 everything you've got --

10 MR. LEHMAN: On disqualification, yes.

11 THE COURT: On sanctions?

12 MR. LEHMAN: Oh, I'm sorry.

13 THE COURT: On both. I'll take both.

14 MR. LEHMAN: So on disqualification, yes, I have more
15 to give you. I could fully brief that.

16 THE COURT: OK.

17 MR. LEHMAN: One issue that I only saw yesterday
18 afternoon and started researching today was under Rule 3.3 of
19 the New York Code of Professional Conduct, which is modeled
20 after the ADA -- and, again, I only saw this yesterday when
21 doing the letter for you.

22 THE COURT: Yes, sir.

23 MR. LEHMAN: The lawyers are required to remedy false
24 statements to the Court.

25 In addition, under Rule 1.6, attorney-client privilege

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1 doesn't apply at that point. So after a trial, if they
2 knowingly -- it says, Rule 3.3(a): "If a lawyer, the lawyer's
3 client, or a witness called by the lawyer, has offered material
4 evidence and the lawyer comes to know of its falsity, the
5 lawyer shall take reasonable remedial measures, including, if
6 necessary, disclosure to the tribunal."

7 And there are other provisions that I would brief on.

8 THE COURT: Yes. Although Mr. Clark and
9 Mr. Mulholland may take the view that even though I decided as
10 I decided, I'm wrong and there is no information to correct.
11 But that's for another day.

12 Do you believe that you could write a longer brief
13 that discusses both the disqualification and the sanctions
14 points without an evidentiary hearing but perhaps identifying
15 things that would be useful to you?

16 MR. LEHMAN: I do believe that I can do it for
17 disqualification.

18 THE COURT: OK.

19 MR. LEHMAN: And I do believe that I could do it for
20 sanctions for the plaintiff with the caveat that he may not be
21 responsible for everything here.

22 THE COURT: Understood.

23 MR. LEHMAN: So I would just be assuming that he is a
24 hundred percent responsible for everything.

25 On the third, I could not give additional briefing on

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1 what should be done with plaintiff's counsel, if anything.

2 THE COURT: Understood. Is there more that you can
3 tell me about the information you believe that I should be
4 looking at in deciding what to do with respect to plaintiff's
5 counsel? And if not, that's fine.

6 MR. LEHMAN: I thought the idea of a second attorney
7 was a good one. It's one that I would -- if a second attorney
8 came and said, yeah, I talked to him independently, told him
9 what's going on, and he said I'm good with this --

10 THE COURT: If that were the case, would you then
11 withdraw your disqualification?

12 MR. LEHMAN: I believe I would. I believe 90 percent
13 chance I would. I would want to look at 3.3 a little bit more,
14 but a strong presumption is if a lawyer independently talks
15 with this gentleman and says this is what's going on and he
16 says these are my attorneys, I'm much more comfortable with it.

17 THE COURT: OK. It sounds like from that answer,
18 though, that I should refrain from setting a briefing schedule
19 on anything further until I hear from Mr. Clark and
20 Mr. Mulholland as to their views with respect to the
21 appointment of a second counsel.

22 MR. LEHMAN: I would agree.

23 THE COURT: Mr. Clark.

24 MR. CLARK: Just to clarify --

25 THE COURT: Yes, sir.

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1 MR. CLARK: -- because I feel like we are talking
2 about a few different issues.

3 THE COURT: We absolutely are, yes.

4 MR. CLARK: My understanding from your Honor's
5 position was that there would be someone from the *pro se* office
6 who would talk to the plaintiff concerning the issues.

7 THE COURT: Yes.

8 MR. CLARK: And not necessarily that they were second
9 counsel or co-counsel.

10 THE COURT: That is in fact what I was thinking, sir.

11 Let me say that again. I would ask Ms. Malloy, at the
12 *pro se* office, to find an attorney to represent Mr. Castillo
13 Marcelino on a limited purpose basis, to show -- to just talk
14 to him about my decision and what issues might arise from that
15 and whether or not he wishes to continue with you as his
16 counsel in light of my decision. And were I new counsel, I'd
17 like at my decision and I'd look at the letters preliminary to
18 this conference and I'd advise him accordingly.

19 And if Mr. Castillo Marcelino wanted to stay with you
20 as counsel, then great. If he wished to do something else,
21 then we'll deal with that. But I believe what Mr. Lehman is
22 saying is he has a longer disqualification motion to write but
23 it's not worth writing if, with the assistance of a second
24 attorney, or having consulted with a second attorney,
25 Mr. Castillo Marcelino stays with your firm.

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1 MR. CLARK: OK. I just wanted to make sure that that
2 is confirmed, because I heard something along the lines of
3 there is a 90 percent chance that if this process is followed
4 that there will be no disqualification motion.

5 THE COURT: Yes. What he said was that he wanted to
6 look at Rule 3.3 and see if that impacted the matter.

7 MR. CLARK: I would like to hear from Mr. Lehman what
8 his views are, because if we are going to end up doing a
9 disqualification motion no matter what, I think that we could
10 move forward with the disqualification motion. Certainly at
11 this point I don't believe that there is a strong background to
12 it. However, given, you know, this process that your Honor
13 suggested, I would very seriously consider using it if it was a
14 way to avoid longer motion practice. If, however, it's merely
15 a dress rehearsal for longer motion practice, I'm much less
16 likely to consider it seriously.

17 THE COURT: OK. By which you mean dress rehearsal on
18 the issue of disqualification. It obviously doesn't obviate or
19 even pertain to the sanctions issue.

20 MR. CLARK: They are distinct issues.

21 THE COURT: Indeed.

22 Would each of you like some period of time to go home,
23 think about it, and tell me, you, sir, whether you are inclined
24 to do it conditionally, Mr. Clark, and you, Mr. Lehman, whether
25 a review with a second attorney that resulted in Mr. Castillo

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1 Marcelino sticking with counsel, with Mr. Clark and
2 Mr. Mulholland, would obviate the need for a disqualification
3 motion?

4 Shall I say that again?

5 MR. LEHMAN: Sure.

6 THE COURT: OK. The question on the floor is whether
7 anyone is aided by having a second attorney that has nothing --
8 no horse in the race speak with Mr. Castillo Marcelino and
9 discuss with him, I believe, my opinion and the letters
10 preliminary to this conference and anything else they wish to
11 talk about. If after discussions with that attorney,
12 Mr. Castillo Marcelino wishes, for example, to stay with that
13 attorney for the remainder of this case, or to get new counsel,
14 then the disqualification motion is obviated because he's
15 electing to go with someone else.

16 Agreed, Mr. Clark?

17 MR. CLARK: Yes. I believe that that was correct. I
18 missed a little bit at the end. My apologies. I was having a
19 side conversation.

20 THE COURT: I saw that. Let me say it slower again.

21 MR. CLARK: My apologies.

22 THE COURT: If after consultation with this second
23 attorney Mr. Castillo Marcelino elects to go with that attorney
24 or someone else, we no longer need a disqualification motion
25 because he will leave you, he will get a new attorney. Agreed?

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1 MR. CLARK: Well, yes. That would be functionally
2 that we were disqualified.

3 THE COURT: However -- OK. The issue is the next part
4 of the other fork in the road, which is if, after meeting with
5 this attorney and having what I believe to be an appropriate
6 discussion with that attorney, he elects to stay, to keep you
7 as his counsel, I'm asking Mr. Lehman if there is a basis for a
8 disqualification motion. What Mr. Clark is saying is it's
9 hardly worth the effort of the consult with the second attorney
10 if we're just going to have to have this motion anyway. I
11 might disagree with that but I'm asking for your thoughts, sir.

12 MR. LEHMAN: I will withdraw my motion or my premotion
13 letter to disqualify Mr. Clark and Mr. Mulholland and their law
14 firm if an independent lawyer talks with the plaintiff about
15 all the legal issues that could arise and the plaintiff decides
16 to stay with that law firm, I will withdraw my motion to
17 disqualify. That does -- and I will withdraw -- I withdraw it.

18 Second, perhaps not, moving forward, if new facts
19 arise that I can't even imagine, then I might do it. I also
20 say, this is not -- I don't have too much of a dog in this
21 particular fight.

22 THE COURT: Yes. You're trying to stave off a Second
23 Circuit reversal.

24 MR. LEHMAN: And, frankly, some courtesy towards a
25 person who might not be as advantaged as I have and it is now

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1 getting serious. And I intend to treat it seriously, but I'm
2 fine; if he wants to stay with him after talking to him, so be
3 it.

4 THE COURT: OK. Mr. Clark.

5 MR. CLARK: As I stated earlier, I would want a short
6 period of time. I can get back to the Court within 48 hours,
7 if that is OK?

8 THE COURT: Yes.

9 MR. CLARK: To talk to the client and ensure that he
10 is also open to going through that procedure.

11 THE COURT: I assume that you will be dispassionate in
12 your discussion of that procedure --

13 MR. CLARK: Certainly, your Honor.

14 THE COURT: -- with your client?

15 If you agree to that procedure, may I understand that
16 I may speak with Ms. Malloy about the parameters of what this
17 new counsel is being asked to do?

18 MR. CLARK: And that is the Pro Se Clerk, correct?

19 THE COURT: Indeed.

20 MR. CLARK: I don't have any objection to that, your
21 Honor.

22 THE COURT: OK. Mr. Lehman, no objection to my
23 speaking --

24 MR. LEHMAN: No objections, your Honor.

25 THE COURT: I don't think that I would be speaking to

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1 the attorney him or herself, I think I would be just channeling
2 things through the *pro se* office. I don't think it is
3 appropriate for me to speak to the attorney. That is the
4 current contemplation.

5 MR. CLARK: Understood.

6 THE COURT: OK. Then let's do that. I don't want to
7 delay this. Neither do you. You want resolution. So do I.
8 But I care more that everyone is treated fairly.

9 I will work with the *pro se* office to see if someone
10 can be secured. As I'm doing that, you will tell me your views
11 on it. If it turns out that you disagree, then I'll set a
12 briefing schedule for the disqualification motion. And I think
13 we'll just do that one first, and that will inform the size of
14 any other motion.

15 It's unfortunate that we can't get things done more
16 quickly but this is -- again, we're trying to be fair and
17 correct here, so let's do that.

18 Mr. Clark, with that in mind, is there anything else
19 we should be addressing today, sir?

20 MR. CLARK: Certainly in terms -- my understanding at
21 this point is we're addressing the disqualification issues
22 first.

23 THE COURT: Exactly right, sir.

24 MR. CLARK: We have not set a timetable as to
25 submissions concerning the Court's questions?

I5ldmarc

1 THE COURT: We have not because I can't tell you how
2 quickly I can get someone who would wish to represent
3 Mr. Castillo on so unique a limited purpose representation, and
4 you still haven't told me that you agree to it.

5 MR. CLARK: Understood.

6 THE COURT: Mr. Mulholland.

7 MR. MULHOLLAND: At this point we have to talk to
8 Marcelino.

9 THE COURT: I understand that, sir.

10 MR. MULHOLLAND: I wonder, as an alternative, if we
11 could brief Marcelino as to whether he could come to court for
12 a brief limited purpose hearing for the Court to the give him
13 advisos --

14 THE COURT: A civil Curcio hearing?

15 MR. MULHOLLAND: Yes. I don't know if that is an
16 option.

17 THE COURT: I don't know that that is an option. I
18 don't know. I would be concerned that I would be perceived as
19 giving him legal advice, which is not something I want to do.
20 I also don't want you to later on say that the judge who is
21 considering sanctions is the one who is talking to him about
22 what he should do. I haven't thought that through yet, sir, so
23 I will think that through. I will let you think it through as
24 well.

25 MR. MULHOLLAND: Yes. Thank you.

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1 THE COURT: Thank you.

2 OK. Mr. Lehman, anything else today, sir?

3 MR. LEHMAN: Nothing, your Honor.

4 THE COURT: All right. Thank you all very much for
5 coming in. Thank you for your patience. I will hear from you
6 as soon as I can hear from you.

7 MR. CLARK: Thank you, your Honor.

8 THE CLERK: All rise, please.

9 (Adjourned)

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